
U.S. Department of Labor
Office of Administrative Law Judges
101 N.E. Third Avenue, Suite 500
Ft. Lauderdale, FL 33301

DATE: JULY 12, 1993
CASE NO: 93-ERA-0009

In The Matter of

ROBERT D. FUGATE,
Complainant

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

Appearances:

DONALD MARTY LASLEY, ESQ.
For the Complainant

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel,
BRENT R. MARQUAND, ESQ.
JOHN E. SLATER, ESQ.
For the Respondent

BEFORE: E. EARL THOMAS District Chief Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (hereinafter "ERA" or the "Act") and the implementing regulations set forth at 29 C.F.R. Part 24. These provisions, commonly known as the "whistleblower" provisions, protect employees against discrimination in employment for attempting to implement the purposes of the ERA and the Atomic Energy Act, as amended, found at 42 U.S.C. §2011 et seq. A hearing was held in Knoxville, Tennessee on March 29 and 30,

1993 and all parties were afforded full opportunity to present evidence and legal argument.

At the outset of this hearing, the Tennessee Valley Authority (hereinafter

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"TVA") filed a motion for partial summary decision seeking dismissal of certain of the claims alleged by Complainant as being untimely and barred under the provisions of the Act. In response to that motion, Complainant stated that the complaint alleged an "ongoing pattern of harassment and intimidation" from April 17, 1990 to the present. See, "Response to TVA's Motion for Sanctions," filed March 29, 1993. The response did not deny that the specific dates alleged in Respondent's motion were in error, nor were these dates disputed at the hearing. The order issued March 24, 1993 determined that the claims numbered 1 through 5, as stated in TVA's motion, were deemed to be admitted for the purpose of determining the timeliness of the complaint.

Because of Complainant's position that TVA had engaged in a continuing pattern of harassment, as opposed to a single act, ruling on the motion was deferred until after receipt of all of the evidence. After consideration of all of the evidence, I find that there was not a causal connection between the various incidents alleged and recommend that the complaint be dismissed for all actions occurring more than 30 days before June 28, 1991. For other reasons, I recommend that the complaint be dismissed in its entirety.

STATEMENT OF THE CASE

Robert D. Fugate filed a complaint on June 28, 1991, claiming that the TVA had discriminated against him in violation of the Act.[1] During all times pertinent to the events raised in the complaint, Fugate, a steamfitter, was employed by TVA as a fire protection operator at TVA's Watts Bar Nuclear Plant in the Nuclear Power's Operations Support Organization. He remains employed by TVA in that capacity.

On April 17, 1990, Fugate raised his concern over TVA's hiring of an "outside" fire fighter for its fire protection program with TVA's Employee Concerns office. He alleges that, as a result of voicing this complaint, he became a victim of some seven related discriminatory actions, the first of which occurred on May 3, 1990, and the last on June 9, 1991. Stated briefly in chronological order, the following actions were alleged:

1. On May 3, 1990, employee Clarence Bolton did not relieve Fugate until 30 minutes after the end of Fugate's shift and Bolton did not request annual leave for his tardiness until May 18, 1990.

2. In August, 1990, Vernon Shanks, Project Manager of the Operations Support organization, determined that Fugate was not qualified to serve as a dual rate foreman

due to his lack of certain training required by Administrative Instruction 12.3.1, Fire Protection Training.

3. In 1990, Robert A. Blakemore, Fire Protection Foreman, did not afford Complainant the opportunity to attend Level III Self Contained Breathing Apparatus (SCBA) training.

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4. On unspecified dates, Fugate was not called by supervisors to work overtime even though his seniority required that he be offered such overtime.

5. On April 26, 1991, French A. Clendinen, Fire Protection Foreman and Fugate's supervisor, improperly revised a biweekly performance feedback.

6. On April 28, 1991, Fugate was docked more hours than other fire protection operators for travel in connection with training.

7. On an unspecified date, Shanks required that Fugate "rework and redo" the work on a firehose station work package.

An initial investigation conducted by the Wage and Hour Division District Director concluded that the complaint was timely and that the discriminatory actions were directly related to the "nuclear safety issues" raised.[2] Various corrective measures were specified to remedy the violation. TVA appealed that determination and requested a de novo hearing. Thereafter, the matter was referred to the office of Administrative Law Judges for adjudication. The exhibits proffered at the hearing, along with the hearing transcript, comprise the record herein.[3]

FINDINGS OF FACT

The Activity-Employee Concern Over Fire Fighter Selection

Admiral White, then Chairman of the TVA Board, decided in October, 1987 to establish a fire department within TVA. Prior to that time, there was only a "fire brigade" which consisted of a mixture of various employees assigned to the Emergency Medical Service, Auxiliary Unit Operators, and a Hazardous Materials Team. Tr. 42. Apparently, employees from each group were needed because there was not a group of employees with skills in all three areas. Instead of continuing to staff solely with crafts people, such as steam fitters, for the fire operator position, TVA decided to hire outside professional fire fighters. Tr. 3444.

Although Clendinen was Fugate's regular supervisor, Fugate reported to Foremen Blakemore and Jarvis when he was working on their shifts. Tr. 12. Fire operators worked

rotating shift schedules and Fugate received work assignments from Blakemore and Jarvis when assigned to their shifts. Blakemore was a "fire fighter" fire operator as opposed to a "steam fitter" operator. Tr. 42. Fugate himself had been classified as a "dual-rate" foreman and functioned as a supervisor while working overtime during the absence of a regular foreman. Tr. 14.

There was general resentment when TVA hired outside fire fighters as fire

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operators. Tr. 42, 238. Fugate, who had been a steam fitter fire operator for at least 15 years at the Watts Bar Plant was concerned that TVA was going outside the union crafts to hire these people, but he testified that he did not believe it was necessary for a foreman to have been a craftsman as opposed to having been a fireman. Tr. 44, 163, 197. Fugate's attitude and demeanor changed after the outside fire fighters were hired, but generally he was a well respected worker. Tr. 34.

Fugate went through "Nick-a Jack"[4] training with David Sanders. Tr. 78. According to Fugate, Sanders had worked with TVA at the Sequoyah plant and was laid off. Tr. 194. He then worked for the City of Chattanooga for 18 months, but he was with its fire department only eight months. Sanders was hired again by TVA for a fire operator position, and on that same day, April 17, 1990, Fugate filed a complaint about the hiring with the Employee Concern Program. Although the determination of whether to hire fire fighters or craftsmen to fill fire operator positions was a management prerogative, the person had to have at least two year's experience in fire fighting in order to qualify. Tr. 197, 300-310; see, Administrative Instruction 12.3.1. RX 5.

Fugate had advance information beginning with a job announcement in the local newspaper that Sanders was going to be hired, and believing that he was not qualified, went to the Employee Concern Program on April 6, 1990 to complain that Sanders did not qualify for either the electrician or steam fitter position. Tr. 294. In filling out the complaint form, Fugate checked the box that indicated his concern was not related to safety, but instead dealt with personnel classification. RX 1-2, 9. He checked the non-safety box after discussing the appropriate classification of this issue with Concern Resolution staff members, Lasley and Hatten. Tr. 188, 294; RX 1.

Fugate was under the impression that when Sanders' experiences at TVA and the Chattanooga Fire Department were totaled, he did not have the required two years' experience in order to qualify as a fire operator. Tr. 194. Actually, Sanders had about 22 months' experience with the City of Chattanooga Fire Department when he first went to work with TVA in 1987. He then was riffed in 1989 and rehired from a re-employment priority hire list in April, 1990. Because of his additional Chattanooga Fire Department experience, Sanders met the job qualifications when he was rehired. Tr. 301.

At the time Fugate reported his concern over hiring Sanders, there was an uneasy atmosphere around the plant because of budget cuts and pending lay-offs. Employees were worried about losing their jobs and supervisors were fearful they might be demoted. Tr. 340-341. Although Blakemore and Clendinen testified that they were not aware of any safety related complaints being raised by Fugate, no one, except perhaps Fugate, thought it was a good time to be announcing problems. Tr. 10, 270, 325.

Fugate apparently got along well with Clendinen, his immediate supervisor, but after the concerns were raised, Blakemore and Jarvis, his swing shift foremen,

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began avoiding him. Tr. 12. Any time Fugate was around, they became silent and would discuss only work. Tr. 29. Although they exhibited withdrawn behavior around Fugate, there were no hostile actions. They treated him politely. Tr. 34. Their concern was that any remarks made during supervision might be considered harassment and could result in the filing of charges. Tr. 326.

Although Fugate maintains that he went to Employee Concerns[5] because he felt personnel qualifications were a safety issue,[6] it is obvious that, at the time, he believed this was only a personnel matter. Tr. 294, RX 1-2, 9. Otherwise, he would have checked the "safety related" box on the reporting form. He also had filed a complaint with the TVA Office of Inspector General that an employee's "moonlighting" had caused a conflict of interest with that employee's TVA job. Tr. 48. This "whistleblowing" was not alleged to relate to safety.

Fugate's complaint about hiring Sanders was referred by the Employee Concern Program to TVA's office of Human Resources ("OHR") for resolution. Tr. 293; RX 1, p.8. The OHR determined that under TVA's union/management agreement, TVA retained the prerogative to hire either fire fighters or craftsmen. There was nothing in TVA's policy or procedure which required the selection of union craftsmen. Tr. 300; RX 1, pp. 8-10; CX 1, p.4. After these facts were explained to Fugate, he informed the Employee Concerns Program that the issue had been resolved. Tr. 197, 300; RX 1, pp.9-10.

Discriminatory Actions

Beginning in 1991, Fugate went to Randy Higgenbottom in Personnel, Manager Keith Fogelman, and others, to complain that he was receiving discriminatory treatment. Tr. 155. The following actions were alleged to be instances of discrimination by TVA.

A. Shift Relief

On May 3, 1990, Fugate was working the evening shift from 3:00 p.m. to 11:00 p.m. Tr. 125. His relief, Mr. Bolton, called in to say he would be late. Bolton was 30 minutes late and Fugate finally left at 11:40 p.m. Tr. 128. Bolton was scheduled for the 11:00 p.m. to 7:00 a.m. shift. His replacement arrived at 6:30 a.m. and Bolton took 30 minutes of annual leave - leaving at 6:30 a.m. But Bolton did not take the 30 minutes of leave until after Fugate complained to TVA manager Baker. Tr. 242. At some point, Baker had the time sheet corrected. Fugate maintained at the hearing that Bolton still cheated TVA out of ten minutes because he did not arrive until 11:40 p.m. and would not have completed his eight hours until 7:40 a.m. Tr. 128, RX 8.

Foreman Blakemore testified that at the time of the incident, there existed an informal working relationship in which late arrivals or early departures would be covered by

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the persons being relieved, and formal leave usually was not charged unless the person who had to work extra time requested that leave be charged. Employees made up the deficient time among themselves. Tr. 239. After Fugate complained about the Bolton incident, Baker terminated the informal flextime procedure. Tr. 242.

There was an allegation by Fugate that Vernon Shanks may have had something to do with Fugate's relief being late on May 3, 1990. Mr. Shanks was a project manager in the Operations Department, and was acting Fire Protection Manager from August 27, 1990 to August, 1992. However, he had nothing to do with Bolton's relief on May 3, 1990 because as of that date, he had not yet taken over his management role. Tr. 308.

B. Removal of Dual-Rate Foreman Status

Prior to August of 1990, Fugate had served as a "dual-rate" foreman which enabled him to function as a supervisor at a higher rate of pay while working overtime during the absence of a regular foreman. Tr. 14, 199. When Clendinen, Fugate's foreman, was going to be out for back surgery, Vernon Shanks, the project manager, looked for someone qualified to take Clendinen's place. Tr. 311.

The word had gotten out that a temporary foreman would be appointed for Clendinen, and J.L. Goodman told Jarvis that if the individual selected was not qualified, he would file a grievance. Goodman was also a candidate for the position. Tr. 335. A dual-rate foreman had to have the same qualifications as a regular foreman beginning in June, 1990. RX 5 (Administrative Instruction 12.3.1, p.7).

As of June, 1990, Fugate did not have current qualifications in incident command training, advanced driver, and pump operator training. Tr.200. After the new policy was implemented, Shanks met with Fugate and told him that he could not continue to qualify

as a dual-rate foreman until he had completed the training courses. Tr. 200-201, 271. When Shanks looked for someone qualified to take Clendinen's place, he knew that Fugate did not have the required training. Tr. 311. He consulted Foremen Bentley, Clendinen, Jarvis, and Blakemore as to who would be the best replacement, and no one had any derogatory remarks about Fugate. Tr. 311. In fact, Clendinen had asked Shanks to leave Fugate in that job until he qualified but Shanks said no. Tr. 278. Sandmel eventually was selected as dual-rate foreman. Tr. 317-318.

Although Fugate cites his failure to be continued as a dual-rate foreman an act of "continuing discrimination," I find that there is no evidence that his non-selection was based upon anything other than his qualifications. Vernon Shanks, who made the determination, had not taken over his duties as Project Manager until after the incident involving Fugate's late shift relief. Even though Sandmel, who eventually was selected, had been disciplined for sleeping on duty, Tr. 317-318, there is nothing to indicate that his selection had anything to do with Fugate or was the result of an unfair management decision.

Fugate points to the fact that foremen were permitted to continue in their

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jobs without required emergency medical technician (EMT) training, as evidence of dissimilar treatment. The new administrative rules published in June, 1990, required EMT training for foremen, but provided that it could be deferred until the next available training opportunity. RX 5. Shanks testified that there was no intent by TVA to make EMT training an absolute requirement for foremen. Tr. 315. Although EMT training was offered in August, 1990, management determined that problems in workload scheduling would not permit the training at that time. Tr. 315. All foremen were eventually trained by August, 1992. Tr. 259.

One of the training courses was given at a time when Fugate was serving as a dual-rate foreman, a voluntary effort on Fugate's part. Fugate made more money working as a dual-rate foreman than he would have made attending class as a journeyman fire operator. Tr. 249. Because the choice to either volunteer as a supervisor or attend training was Fugate's, I find that his failure to qualify as a dual-rate foreman was his own fault.

C. SCBA Training

Training in self-contained breathing apparatus (SCBA) was one of the requirements for foreman or dual-rate foreman that was added by Directive A.I. 12.3.1 which was issued on June 30, 1990. Tr. 259; RX 5, p.7. There were instances both before and after the issuance of A.I. 12.3.1 when SCBA training was offered. Fugate contends that his failure to receive the training was one of the discriminatory actions TVA took against him.

Fugate testified that he was bypassed for the SCBA training "in the summertime" after he filed the complaint about Sanders on April 17, 1990. Tr. 85. TVA manager, W.H. Baker, had written a memo to foremen on July 14, 1990 stating that Fugate, among others, should be scheduled for the training. CX 5. Two people from each crew were scheduled, but Fugate happened to be off from work when the instructor came to the plant on August 1, 1990. Tr. 86; CX 5.

According to Fugate, Blakemore was supposed to have called him and the other employees who attended the training, but failed to do so. Tr. 256. The training was scheduled in advance, and employees knew when they had to be available. Tr. 256. I find from the Baker memo that Fugate knew when the training was scheduled.

At another time when the training was offered, Fugate did not attend because the TVA contractor who taught the course wanted to reduce the number of students from ten to five or six. Tr. 208. The contractor felt that it was too dangerous to have the number of people selected by TVA handling the equipment. Tr. 246. This decision was made on the day of training and TVA did not know in advance that it would be an issue. Tr. 210. The students themselves decided who would take the training, and as a consolation, the ones not picked could go home and receive one and one-half day's pay. Tr. 246.

On another occasion when Fugate was scheduled for the training, he was serving as a temporary foreman and could not attend. However, this date preceded the revision

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of A.I. 12.3.1 and no one knew at the time that SCBA training would be required. Tr. 231.

D. Loss of Overtime

The failure to be called for overtime work was another of the alleged discriminatory actions by TVA. Administrative Instruction 2.4 established the overtime procedure. Tr. 88. Overtime eligibility was awarded to the employee who is off duty and has the lowest number of overtime hours. However, overtime could not be awarded if it caused the employee to work 16 or more consecutive hours. Tr. 87. The Administrative Instruction also required that overtime be performed by employees in the classification for which overtime was required. Tr. 88.

Fugate recalled two instances in which he claims to have been bypassed for overtime. On December 23, 1990, Webb called in to report his absence due to roads which had been rendered impassable by a storm. Tr. 181. Foreman Jarvis kept Osborne to work overtime instead of asking Fugate. Tr. 182. Actually, Fugate did not know whether he was first on the call-in list, and even if he were, he already had worked eight hours. The

Administrative Instruction would have prevented his working 16 straight hours. Tr. 183. Regardless, this incident occurred prior to Fugate's complaint about the hiring of Sanders.

On June 21, 1991, Fugate allegedly was bypassed for overtime. Although he was on annual leave, he had asked his supervisor, Clendinen, to call him if overtime became available. Tr. 94. objection to the introduction of evidence concerning this allegation was sustained because, although asked, Complainant failed to mention this incident in his deposition or at any other time during discovery.

E. Biweekly Performance Feedback

Fugate alleges that, as a result of his "whistleblowing" activities, his periodic evaluation was lowered. Although his performance rating was lowered, it had nothing to do with any complaints he had made. Leonard Bush, Plant Operations Superintendent, had written Shanks and others a memorandum telling him that all of the plant ratings were too high. RX 3. The memorandum informed all managers that a "5" was like walking on water and that evaluations should be more realistic. Tr. 166167.

Foreman Clendinen confirmed that Shanks told him to revise Fugate's evaluation because his ratings were too high. Tr. 273; CX 1. This was accomplished on April 26, 1991. Clendinen had also received the Bush memorandum. RX 3; RX 4. Fugate admitted that there was a general directive for supervisors to lower performance ratings, and that Superintendent Bush had no idea who he was. Tr. 167. He also confirmed that Shanks had never mentioned or discussed his concern about hiring Sanders. Tr. 167.

Shanks returned the evaluations of Fugate and others because he found them to be unrealistic. Over-complimentary evaluations were a problem operations wide. Tr.

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320. I find there was no evidence that the reduction in Fugate's performance evaluation had anything to do with his concern about the hiring of Sanders.

F. Docking of Travel Time

Employees are required to travel each year for "Nick-A-Jack" training.[7] For reimbursement for use of private automobiles for travel, TVA regulations provide mileage plus one hour of pay for each 40 miles driven. From the Watts Bar Plant to the training site was 83 miles. Also, 30 minutes of travel time was allowed between the training site and the hotel. CX 8. Fugate claims that after his time sheet was submitted for

training related travel, he was improperly docked four hours of travel time in retaliation for his whistleblowing activities.

Maples, a TVA payroll clerk, testified that when Fugate's time sheet was submitted for eight hours of travel time, they felt it might be a mistake, but they paid him anyway thinking that they could correct the error later. Tr. 287; RX 6. The mistake was in fact noticed by Central Payroll in Knoxville and returned to the Watts Bar Plant for correction.

Although Fugate signed his time sheet (CX 8) which shows eight hours of compensation for travel to and from the Nick-AJack training, he admitted that he was entitled to only four hours instead of eight. Tr. 170. He also admitted that his foreman made an honest mistake in filling out the time sheet. Tr. 171. Fugate further acknowledged his own mistake in signing the erroneous document. Tr. 171. Mr. Shanks, who apparently is the alleged discriminating official, knew nothing about Fugate's time sheet having been adjusted. Tr. 321. Thus, the evidence is compelling that TVA's adjustment of Fugate's time records was nothing more than a correction of a mistake to which he was a party.

G. Fire Hose Inspection

Fugate asserts that he was improperly required to sign off on a fire hose inspection. He cites this as evidence of continuing discrimination, but like the docking of travel time, it appears this was merely another clerical mistake.

After he signed off on a fire hose work station package ("value package"), Fugate went on vacation. Tr. 176. When he returned, Foreman Jarvis gave him the package back and asked him to perform the inspection (hydrostatic hose test) again. Tr. 176. Apparently, Jarvis did not realize that someone else had worked on the package while Fugate was on vacation. There was some disagreement over the proper procedure for testing the hose, and Fugate went to see Supervisor Baker (Baker was Shanks' predecessor). Baker told Fugate to go ahead and redo the package. Tr. 180.

Fugate admitted that the supervisors who were encouraging him to sign off on the hose station package were not aware that he was being asked to sign off on someone else's work. Tr. 217218. Although it is not clear from the record whether Fugate was complaining

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about signing off on another person's work or having to redo the package, it is obvious that this incident was, to use Fugate's description, "small."[8] I find no evidence that any work instructions concerning the fire hose inspection were discriminatory.

CONCLUSIONS

The Activity

To establish a prima facie case of discrimination, the complainant must show that he engaged in protected activity of which the respondent was aware and that the respondent took adverse action against him. Texas Dep't. of Community Affairs v.- Burdine, 450 U.S. 248 (1981). In addition, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Cohen v. Fred Mayer, Inc., 686 F.2d 793 (9th Cir. 1982); Jain V. Sacramento Mun. Util. Dist., 90 ERA 1 (Sec'y Apr. 2, 1992); Dartey v. Zack Co. of Chicago, 82 ERA 2 (Sec'y Apr. 25, 1983). The employer may rebut this by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. Shusterman v. Ebasco Servs., Inc., 87 ERA 27 (Sec'y Jan. 6, 1992); Larry v. Detroit Edison Co., 86 ERA 32 (Sec'y June 28, 1991). It is well settled, at least by the Secretary, that purely internal complaints are covered by the ERA. Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505 (l0th Cir. 1985), cert. denied, 478 U.S. 1011, 92 L.Ed.2d 724, 106 S.Ct. 3311 (1986). However, there must be some causal relationship between the protected activity and the retaliation. Couty v. Dole, 886 F.2d 147 (8th Cir. 1989).

The protected activity must relate to the ERA and must concern some aspect of health, safety or quality control. Nichols v. Bechtel Construction, Inc., 87 ERA 44 (Sec'y Oct. 26, 1992). There must be some nexus with the activity being regulated. Rose v. Secretary of Dep't. of Labor, 800 F.2d 563, 565 (1986).

The only activity which Complainant has mentioned, and indeed, the only activity shown in the record, which could possibly qualify as "protected" is the "complaint" he filed with the Employee Concerns Program. Although Fugate testified that his complaint was over the hiring of an applicant with less than the required experience, the documentary evidence and testimony of others indicates that his real concern was the selection of "outside" fire fighters over craftsmen whom Fugate felt were better qualified. Regardless of which concern was paramount, neither concern related to any aspect of plant safety, quality control or health of employees or the public.

The qualifications of employees was clearly a management prerogative. But even if Complainant had a legitimate interest in the qualifications of those with whom he worked, such qualifications were purely a personnel matter. Although qualifications of fire operators could be seen as having some relationship to plant safety, so could almost every other

aspect of a plant's operation. For example, if personnel compensation were not high enough to attract highly qualified employees, one could argue that this might also be related to safety, but these kinds of considerations are not covered by the ERA.

A Memorandum of Understanding between OSHA and the NRC, printed in the Federal Register, Vol. 53, No. 210 at 943, 950 (Oct. 31, 1988), describes the concerns these agencies have over worker protection at NRC licensed facilities. After outlining the four kinds of hazards that may be associated with nuclear plants, e.g. radiation risk, chemical risk, etc., the memorandum provides the following examples of matters that would be reported to the NRC:

> a. Lax security control or work practices that would affect nuclear or radiological health and safety.
> b. Improper posting of radiation areas.
> c. Licensee employee allegations of NRC license or regulation violations.

Clearly, these kinds of concerns are not obviously involved in personnel qualifications. Moreover, complainant has not provided reference to any regulation or policy directive which indicates that his complaint could concern a possible NRC license or regulation violation. Thus, I conclude that the activity does not relate to the ERA.

Timeliness of Complaint

Complainant alleged and offered proof of seven discriminatory actions, all of which occurred more than 30 days prior to the June 28, 1991 complaint. An uncontested ruling at the hearing established that all but two of the complaints were untimely. Tr. 91-92. Of the two remaining, the fire hose inspection incident occurred before August, 1990. (Tr. 180). The other cited act of discrimination involved TVA's alleged failure to call Complainant for overtime on December 23, 1990, and supposedly, on June 21, 1991. objection to evidence surrounding the June 21, 1991 incident was sustained because of Complainant's failure to mention this incident during discovery. Thus, there was no proof that any of the seven alleged acts of discrimination occurred within 30 days of the complaint.

In the alternative, Complainant asserts that he was a victim of a pattern of discrimination which constituted a continuing violation. The courts have made it clear that the short period of time for filing complaints is congressionally mandated.[9] School District of Allentown v. Marshall, 657 F.2d 16, 20 (3rd Cir. 1981); Rose v. Dole, 945 F.2d 1331 (6th Cir. 1991) (per curiam). The 30 day filing period begins to run when the facts which would support a discrimination complaint are known to the employee. Ottnev v. Tennessee Valley Authority, 87 ERA 24. Knowledge of the employer's actions establishes the running of the clock. Billings v. Tennessee Valley Authority, 86 ERA 38 (Secly June 28, 1990), aff'd

without opinion, 923 F.2d 854 (6th Cir. 1991). On the other hand, the "continuing violation" theory cited by Complainant has been used to excuse strict reporting compliance with statutory limitations periods "[w]here the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." Waltman v. Int'l. Paper Co., 875 F.2d 468, 474 (5th Cir. 1989), quoting Abrams v. Baylor College of Medicine, 805 F.2d 528, 532 (5th Cir. 1986). Situations in which a disproportionately heavy workload never lightened, and "black listing" have met the definition of "continuing." Held v. Gulf Oil Co., 684 F.2d 427, 430-432 (6th Cir. 1982).

Some of the distinctions drawn by the courts include whether the acts are recurring or are more in the nature of an isolated work assignment or employment decision. Green v. Los Angeles Cty. Superintendent of Sch., 883 F.2d 1472, 1480-1481 (9th Cir. 1989). In other words, the relevant inquiry is whether there were sporadic outbreaks of discrimination or a dogged pattern. Bruno v. Western Elec. Co., 829 F.2d at 961; Shedadeh v. Chesapeake & Potomac Tel. Co., 595 F.2d 711, 725 n.73 (D.C. Cir. 1978). Emphasis also has been placed on the degree of permanence the act may have. Berry v. Bd. of Supervisors of LSU, 715 F.2d 981 (5th Cir. 1983), cert. denied, 479 U.S. 868 (1986). An adverse action that could likely have future consequences, such as loss of a promotion, change of duty stations or termination is cause for more concern than denial of a leave application. Waltman v. Int'l. Paper Co., 875 F.2d 476 (5th Cir. 1989).

In many of the continuing violation cases, the Secretary has placed emphasis upon the relationship between the discriminatory acts. If each of the events is discrete and unrelated to the others, then each would provide the basis for a complaint. In other words, in order to prove a continuing violation, the burden is upon complainant to show a pattern of progressive or related acts, none of which is sufficient in and of itself to trigger the statute.

The seven acts involved in this complaint do not show either a series of acts or that they were related to each other. The failure of a shift replacement to show up for work on time could not have been an act of discrimination because no one in management could have foreseen that Complainant's replacement would be late. Knowledge by a discriminating official is an essential element of proof. Bartlik v. TVA, 88 ERA 15 (Sec'y Dec. 6, 1991). Removal of Fugate's status as a dual-rate foreman was obviously a significant, albeit temporary action; however, there was no indication that TVA's change in qualifications policy was made to target Fugate. In fact, his failure to qualify appeared to be as much his own fault as anything else. The same is true with Fugate's failure to attend SCBA training.

The loss of overtime on either one or even two instances and the fire hose inspection situation were such minor incidents that they could not possibly be construed as part of a pattern. Berry, supra. The revision of Fugate's biweekly performance feedback was part of a plant-wide policy change and was not directed to Fugate. Likewise, the docking of

four hours of travel time was done solely to correct an administrative error which was partially Fugate's fault to begin with.

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It is clear from an analysis of each of the seven incidents that they were not related or even directed at Fugate. Some were self-inflicted, and the only act of significance - the removal of his dual-rate designation - was the result of a major policy change which was made without concern of Complainant. Thus, I conclude and recommend that the evidence does not support an allegation of continuing violation.

RECOMMENDED ORDER

Consistent with the foregoing, it is hereby recommended that the complaint of Robert D. Fugate against Tennessee Valley Authority be DISMISSED.

E. Earl Thomas
District Chief Judge

EET/pc
Ft. Lauderdale, FL

[ENDNOTES]

[1]The amendments made to the ERA by Section 2902 of Pub.L.No. 102-486, printed at 138 Cong. Rec. H12150-51 (daily ed. Oct 5, 1992), are by the express terms of those amendments inapplicable to this complaint, which was filed before the amendments' effective date of October 24, 1992. See, Section 2902(i), 138 Cong. Rec. H12151.

[2]Neither the protected activity nor the "nuclear safety issues" were identified or described in the District Director's notification letter of November 23, 1992.

[3]The following abbreviations will be used when citing to the record: "RX" for Respondent's Exhibits; "CX" for Complainant's Exhibits; and "Tr." for transcript.

[4]Some type of specialized training frequently mentioned but not described by the parties.

[5]Fugate did not tell anyone of his intention to file a complaint with Employee Concerns, and neither Jarvis nor Blakemore ever discussed the matter with him. Tr. 84, 198.

[6]The complaint of June 28, 1991 filed by attorney W.P. Boone Dougherty does not describe the protected activity.

[7]The record does not identify or describe this particular type of training.

[8]Mr. Fugate's explanation of this incident is found in CX 7. Although the document was rejected as evidence, the undersigned reviewed it merely to try to understand the nature of the complaint.

[9]Amendments to the ERA which lengthen the filing period are not applicable to this complaint, which was filed prior to their effective date of October 24, 1992. See, Section 2902, Pub.L.No. 102-486, 138 Cong Rec. H 12150-51 (daily ed. Oct. 5, 1992).